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Attorneys at Law

Via Electronic Filing

July 9, 2018

Jocelyn G. Boyd, Esq.
Chief Clerk & Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: **Response to Joint Applicants' Request and Petition for Commission Review of Order Nos. 2017-73-H & 2017-79-H, Which Were Entered in the Consolidated Docket for Docket Nos. 2017-207-E, 2017-305-E, & 2017-370-E**

Dear Ms. Boyd,

I write on behalf of the South Carolina Office of Regulatory Staff ("ORS") to respond to South Carolina Electric & Gas Company's ("SCE&G") petition to the Public Service Commission of South Carolina (the "Commission") to rehear, reconsider, and overrule the decisions in Order Numbers 2017-73-H & 2018-79-H, which were entered by Hearing Officer David Butler on June 21, 2018, and July 3, 2018, respectively, in the Consolidated Docket. The Hearing Officer's decisions to grant ORS's motion to compel production of documents in response to ORS's Request for Production 5-25 was well-founded and should be affirmed by the Commission.

As an initial matter, SCE&G is wrong in blaming the Hearing Officer for the narrow window of time – two business days – between his latest discovery order and the date for production of documents. SCE&G waited eleven days from the Hearing Officer's June 21, 2018, initial decision to file its petition for reconsideration, and only three days before the production was due. The Hearing Officer acted swiftly on SCE&G's petition for reconsideration – he denied it the day after the petition was filed. In any event, ORS has no objection to SCE&G's request for an additional eight days to comply with the Hearing Officer's order concerning ORS's Request for Production 5-25.

SCE&G is also wrong on the merits of this discovery issue. In its Response to ORS's Motion to Compel, SCE&G stated that it "has agreed to produce all information

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that has any reasonable connection to the Project." (Resp. at 29.) ORS is seeking no more than that. Thus, there does not appear to be a dispute between the parties concerning what documents are to be produced in response to ORS Request 5-25. For this reason alone, SCE&G has not raised any basis to reconsider, let alone rehear or overrule, the Hearing Officer's decisions.

Moreover, contrary to SCE&G's argument, courts have found discovery requests that seek discovery from parallel investigatory proceedings to be permissible. As one court explained, common sense should dictate the result in such situations:

> The Court need not make an illogical leap to conclude that the documents that [defendant] has produced to the [investigating agency] are relevant to subject matter in this case. The [investigating agency] is investigating the same alleged wrongful conduct as is alleged by Plaintiffs. There can be no serious dispute that documents related to the [investigating agency's] investigation of Defendants reinsurance arrangements are relevant to Plaintiffs suit based on identical allegations. While Defendants argue that the [investigating agency] has broad subpoena powers that extend beyond the scope of the federal rules, this argument does not negate the plain relevance of the documents Plaintiffs' request, nor does this argument shield the documents from discovery. The Court concludes that Defendants have not met their burden of showing that the documents that Plaintiffs seek are irrelevant to Plaintiffs' suit.

Munoz v. PHH Corp., No. 1:08-CV-0759-AWI-BAM, 2013 WL 684388, at *4 (E.D. Cal. Feb. 22, 2013). Other courts have similarly noted this critical factor in so-called "cloned" discovery: does the parallel investigation or proceeding involve overlapping issues with the case at bar such that the information is relevant and tailored.[1]

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[1] *See Peterson v. Wright Med. Tech., Inc.*, No. 11-1330, 2013 WL 655527, at *6 (C.D. Ill. Feb. 21, 2013) ("In this case, the "cloned" discovery seeks information that is relevant to plaintiff's claims and defendants' defenses and that it is reasonably calculated to lead to the discovery of admissible evidence on the questions of what Wright knew and when Wright learned what it knew about the defect alleged in the complaint and the failure that allegedly resulted from that defect."); *see also In re Hardieplank Fiber Cement Siding Litig.*, No. 12-MD-2359, 2014 WL 5654318, at *2 (D. Minn. Jan. 28, 2014) ("As narrowed to lawsuits that involve the quality or durability of James Hardie's siding, these requests for documents are reasonably calculated to lead to the discovery of admissible evidence."); *Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-CV-02200-HSG-KAW, 2017 WL 1101799, at *4 (N.D. Cal. Mar. 24, 2017) (permitting discovery request seeking discovery produced in similar litigation).

As the Hearing Officer correctly found, ORS's request was appropriately tailored to investigations during the last two years and relating to the abandoned project. SCE&G is not required to produce documents from investigations regarding other matters. Thus, SCE&G is raising a straw man in arguing that "the criminal and regulatory investigations from which ORS is now seeking documents are sweeping in scope, and *in some instances*, they relate to matters that have little or no connection to any issues concerning the NND project . . . and are therefore, not relevant." (Petition at 2 (emphasis added).) As the Hearing Officer noted, SCE&G is not being asked to produce information on governmental investigations that do not arise out of the new nuclear development (NND) project that has been abandoned.

It is notable that SCE&G never denies that there have been governmental investigations focused on the key issue in these proceedings, *i.e.*, SCE&G's actions and awareness of facts that led to the abandonment of the Project. Instead, SCE&G simply avoids this key issue and argues that ORS and the PSC have no way of knowing whether there are relevant documents produced in the investigations because ORS and the PSC are not parties to those criminal and civil investigations. But, SCE&G concedes as much in its own securities filings.[2]

As the foregoing courts concluded, it is not an "illogical leap" to find that investigations into the failed project include information highly probative to these Commission proceedings. It is not up to ORS to prove that documents that ORS has not seen, but are in SCE&G's possession and have already been compiled and produced, are relevant to the Commission's proceedings. It is up to SCE&G to produce those documents that are responsive and relevant to these proceedings.

The decision issued by Judge Hayes in the *Cleckley* class action litigation regarding similar discovery requests does not undermine the Hearing Officer's

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[2] "In September 2017, the Company was served with a subpoena issued by the United States Attorney's Office for the District of South Carolina seeking documents *relating to the Nuclear Project.* The subpoena requires the Company to produce a broad range of documents *related to the project.* Also in September 2017, the state's Office of Attorney General, the Speaker of the House of Representatives, and the Chair and Vice-Chair of the South Carolina House Utility Ratepayer Protection Committee requested that SLED conduct a criminal investigation into the *handling of the Nuclear Project* by SCANA and SCE&G. In October 2017, the staff of the SEC's Division of Enforcement also issued a subpoena for documents related to an investigation they are conducting *related to the Nuclear Project.* The investigations have continued since those events. ..." SCANA 10-Q (March 2018), at 39 (emphasis added) (found at https://www.sec.gov/Archives/edgar/data/91882/000075473718000176/a2018331-10q.htm).

decision. Judge Hayes's decision hinged on SCE&G's assurance that it would produce any responsive documents that are relevant to the allegations in the complaint. (Petition, Exhibit 1, at 4.) As noted above, SCE&G has given a similar assurance in these proceedings. The Hearing Officer's decision simply requires SCE&G to comply with its assurance. Whether the ruling (as in case before Judge Hayes) *assumes* that SCE&G will comply with its assurance or the ruling (as in the Hearing Officer's order) *requires* that SCE&G comply with its assurance, SCE&G's obligation is the same.

SCE&G argues that production of these relevant documents will lead to "massively duplicative" production. ORS is not, however, seeking duplicative production. If a document is or has been separately produced by SCE&G in these proceedings, it does not need to be produced again in response to ORS Request 5-25.

Finally, SCE&G claims that responding to this request is burdensome. This argument is also unavailing. ORS is requesting access to documents that SCE&G has already gathered and produced. The incremental effort required of SCE&G to produce these documents to ORS would be minimal in light of the importance of matters at issue in these proceedings and the limited time for discovery, review, analysis, and presentation of the evidence and issues to the Commission. *See Fields v. Wright Med. Tech., Inc.*, No. 4:15-CV-110-RL-JEM, 2017 WL 3048867, at *3 (N.D. Ind. July 19, 2017) ("To the extent that Plaintiff is arguing as to the relative burden of production, the fact that Defendants need not engineer a search from scratch makes Plaintiff's request less burdensome . . .."). Moreover, SCE&G cannot base its refusal to produce relevant documents on a mere conclusory assertion of burden, without further explanation. SCE&G notably failed to present any evidence on this issue to the Hearing Officer or the Commission.

For these reasons, the Commission should reject SCE&G's petition for reconsideration of the Hearing Officer's decision granting ORS's motion to compel production of documents in Response to ORS's Request for Production 5-25.

Most Respectfully,

By: _____
Matthew Richardson
Wyche, P.A.